Nos. 82-1331 and 82-1352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF THE STATE OF MAINE [redacted] IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI OF LOUISIANA PUBLIC SERVICE COMMISSION AND NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *ET AL.*

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BRIEF AMICUS CURIAE OF THE STATE OF MAINE AND THE MAINE PUBLIC UTILITIES COMMISSION IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI OF LOUISIANA PUBLIC SERVICE COMMISSION, *ET AL.*

INTEREST OF THE STATE OF MAINE AND ITS PUBLIC UTILITIES COMMISSION

The State of Maine regulates the rates and service of telecommunications utility companies operating in the State, by means of a statutory scheme which vests extensive ratemaking and other regulatory authority in the Maine Public Utilities Commission. Me. Rev. Stat. Ann., tit. 35, §§1, 4, 15(13), 51 *et seq.* (1978, & Supp. 1982-1983). As part of its supervision of telephone utilities, the Maine Public Utilities Commission (Maine PUC) regulates by tariff the justness and reasonableness

of the charges made by telephone companies for every service provided within the State. *Id.* §§51, 61, 66, 69 (1978, & Supp. 1982-1983). Until the Federal Communications Commission issued its orders in the *Second Computer Inquiry,*[1] the Maine PUC included in its regulatory oversight the rates charged for all customer premises equipment, *i.e.*, the apparatus connected to the local lines of a telephone company, by means of which the customer can use those lines to send and receive voice messages or other intelligence.[2]

The *Second Computer Inquiry* decision, affirmed by the United States Court of Appeals for the District of Columbia Circuit, *Computer and Communications Industry Association v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982), profoundly changes the regulatory treatment of customer premises equipment (CPE) by purporting to require the states to refrain from further rate regulation of CPE, while also altering the corporate structure through which most CPE is provided. The FCC's decision thus deprives the State government of the authority to engage in economic regulation of a significant aspect of telephone service, based upon the State's assessment of local markets and of the pace of technological change in particular localities. Accordingly, the State of Maine and its Public Utilities Commission are directly interested in the disposition of the petitions for review by this court of the FCC's decision to deprive local regulators of authority and flexibility with respect to an important component of telephone service.

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[1] *In the matter of amendment of Section 64.702 of the Commission's Rules and Regulations,* 77 FCC 2d 384 (1980) (Final Decision), 84 FCC 2d (1950) (1980) (Reconsideration Order), 88 FCC 2d 512 (1981) (Further Reconsideration Order).

[2] For interstate transmissions originating from local facilities, of course, the rates are set by the F.C.C. rather than the Maine P.U.C.

SUMMARY OF ARGUMENT

The State of Maine and its Public Utilities Commission support the issuance of a writ of certiorari to the Court of Appeals for the D.C. Circuit, to review the affirmance of the Federal Communications Commission's *Second Computer Inquiry* decision. Because that decision imposes upon the states radical changes in the economic regulation of an essential service — without express Congressional authority — it raises important questions that this Court ought to review.

The new scheme imposed by the FCC with respect to customer premises equipment unlawfully departs from the regulatory obligations of the Commission, because it relies entirely on market forces, rather than agency review, to assure just and reasonable rates. This conflicts with the principle established by this court, in a case involving the remarkably similar statutory language of the Natural Gas Act, that reliance on the marketplace alone was inconsistent with the statute. *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380 (1973).

The FCC lacks authority to order the states to deregulate CPE rates, since such preemption is neither inherently necessary for telephone regulation nor expressly provided by Congress. *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963). Indeed, intrastate rate regulation of telephone service and facilities is expressly reserved to the states, 47 U.S.C. §§152(b), 221(b). Although the Fourth Circuit Court of Appeals has recognized this limitation on the FCC's authority, the court of appeals in this case did not.

To resolve the conflicts in principle between the affirmance of the *Second Computer Inquiry* and decisions of this Court and the Fourth Circuit, and to address the vitally important issues of federal-state regulatory relationships in the control of an essential and rapidly changing industry, the Supreme Court should grant review of the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

A. THE DECISION TO WHICH THESE PETITIONS ARE DIRECTED IS OF EXTRAORDINARY IMPORTANCE, BECAUSE IT ALTERS PROFOUNDLY THE RELATIONSHIP BETWEEN FEDERAL AND STATE REGULATION OF TELECOMMUNICATIONS, WITHOUT AN EXPRESS CHANGE IN POLICY BY CONGRESS.

Until the FCC's Orders in its *Second Computer Inquiry*, Maine's Public Utilities Commission had the clear authority to regulate rates for local service, including the rates for the instruments through which the customer made use of that service, the CPE. Despite the clear reservation of intrastate ratemaking powers to the states, by 47 U.S.C. §§152(b) and 221 (b), the FCC has now ordered State rate regulation of CPE out of existence, and the court of appeals has affirmed that unwarranted preemption.

No party in this matter would dispute that telephone service is a necessity in modern life, nor that fundamental structural and technological changes in the telephone utility industry are now occurring at an unprecedented rate. *See generally United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd* 51 U.S.L.W. 3628 (U.S., Feb. 28, 1983). In recognition of these changes, both the federal district court, in the government anti-trust suit against the Bell System, and the Federal Communications Commission, in its investigations of toll market structure and jurisdictional separation, have increasingly differentiated between the local aspects of telecommunications and the long-distance transmission service, tending to view those two services as fundamentally separate operations. *Id.*; *See also, In the Matter of MTS and WATS Market Structure*, C.C. Docket No. 78-72, Phase I, slip op. at paragraphs 1-8, 363-368 (F.C.C., February 28, 1983) ("Third Report and Order"). In its *Second Computer Inquiry*, however, the FCC has claimed exclusive authority, for the first time in the long history of the Federal Communications Act, to dictate the mode and extent of regulation of what is essentially a local aspect of telephone service: the instrument on the customer's premises.

As explained more fully in the following sections, and in the petitions filed by the Louisiana Public Service Commission and by the National Association of Regulatory Utility Commissioners, *et al.*, no congressional authority can be found for the FCC's imposition of these fundamental regulatory changes upon state regulatory bodies. The long history of joint regulation of CPE in itself establishes that the nature of the subject matter could not possibly justify federal preemption. Similarly, Congress has never expressly authorized either the FCC's policy or the preclusive effect of that policy upon the states. Because of the importance of these questions to the regulation of an essential utility service and to the relationship between federal and state regulatory authority, this Court should issue the requested writ of certiorari to resolve the apparent conflicts between the reasoning of the court of appeals and principles previously established by this Court.

B. Exclusive reliance upon market forces is not a lawful substitute for price regulation under the Federal Communications Act, and such reliance conflicts with the reasoning of this court in a prior decision.

The court of appeals decision upholds the FCC's determination that CPE need not necessarily be regulated under Title II of the Communications Act, apparently on the basis of the Commission's finding of competition in the CPE market. 693 F.2d at 221. In reaching this conclusion, the court of appeals failed to give adequate consideration to this Court's decision in *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380 (1973). That case arose from actions of the Federal Power Commission under the Natural Gas Act, the basic rate regulation provisions of which are remarkably similar to the Communications Act.[3]

[3] Attached to this brief as an Appendix is a table that illustrates the dramatic similarities between the Natural Gas Act (15 U.S.C. §717 *et seq.*) and the Federal Communications Act.

While holding that the FPC had considerable flexibility in choosing the particular method by which to assure that rates were just and reasonable, the Court overturned the FPC's order, which sought to rely upon competition in the industry to assure reasonable rates. *Id.* at 396, 397. Recognizing the underlying purpose of regulation under the Act, *id.* at 397-399, the Court emphasized that "in our view the prevailing price in the marketplace cannot be the final measure of 'just and reasonableness' mandated by the Act." *Id.* at 397. In reaching this conclusion, the Court recognized that market circumstances may have changed since the enactment of the regulatory scheme, and that reliance upon competition might well be in the best interests of consumers, given changes in circumstances. This Court also recognized, however, that

> It is not the court's role...to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process...
>
> ...For the court to step outside its role in construing this statute, and insert itself into the debate on economics and the public interest, would be an unwarranted intrusion into the legislative forum where the debate again rages on the question of deregulation of natural gas producers.

Id. at 400, 401.

As *FPC v. Texaco* makes clear, neither the FCC nor the courts may rely upon competition as a basis for deregulation of rates, in the absence of express Congressional approval. The court of appeals completely ignored this principle, however, in its review of the FCC's decision to deregulate CPE.[4]

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[4] The attention of the court of appeals was called to the Federal Power Commission case and the comparison between the two regulatory statutes at pp. 2-9 of the brief amicus curiae of the Maine Public Utilities Commission in that court.

Having concluded that deregulation by reliance on competition alone was permissible,[5] the court of appeals relied upon this Court's decision in *United States v. Southwestern Cable Company*, 392 U.S. 157 (1968), to support the FCC's exercise of "ancillary jurisdiction" to prohibit the regulation by tariff of CPE. Such reliance is misplaced, however, for that decision establishes only that the FCC may exercise ancillary jurisdiction under 47 U.S.C. §152(a) with respect to aspects of communications that might not fall under other regulatory provisions, elsewhere in the Act. *Id.* at 167-168, 172-173, 178. Certainly, the questions of whether the FCC could lawfully refrain from regulation where it had found jurisdiction, or exercise its jurisdiction to prohibit certain regulatory treatments by other agencies, were never raised in the *Southwestern Cable* case. Indeed, the decision of the court of appeals does not directly address the unique characteristics of the FCC's exercise of ancillary jurisdiction in the *Second Computer Inquiry*: the jurisdiction was used not to assert regulatory authority but to require compliance with a deregulation scheme. In light of the fact that the very section of the Federal Communications Act which provides the source of "ancillary jurisdiction," 47 U.S.C. §152, also contains an express reservation of state power to regulate rates, it is remarkable indeed that an attempt has been made to read this Court's *Southwestern Cable* decision as authority for a sweeping policy change that ought to have been reserved for congressional action.

C. Affirmance of the FCC's Preemption of State Rate Regulation Conflicts with Principles Recognized by This Court and Another Court of Appeals.

[5] The court, as an alternative ground, noted that separation of services subject to regulation from those that are not would be difficult. This argument, standing alone, fails to provide a basis for deciding whether to choose potentially overbroad regulation or to abandon jurisdiction.

In sanctioning the FCC's decision to preempt state regulatory agencies in order to further the federal agency's policy of non-regulation, the court of appeals failed to apply correctly the standards of this Court's decision in *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963). In that case, this Court reiterated that the question of whether a state regulation so conflicts with a federal one as to require preemption depends upon whether the State regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 141 (citation omitted). Accordingly, the Court concluded that federal regulation of a given field should not be viewed as preemptive unless "either...the nature of the regulated subject matter permits no other conclusion or... Congress has *unmistakably so ordained*." *Id.* at 142 (emphasis added). The circumstances under which preemption has been upheld in this case contrast dramatically to the standard enunciated in the *Florida Lime*.

Here, the FCC has chosen to *abandon* regulation in one aspect of telecommunications, and the court of appeals has now concluded that such abandonment, under the guise of "ancillary jurisdiction," preempts state regulation of the price of CPE. The court seems to rest on the fact that "unbundling" of CPE and transmission rates is essential to a valid federal policy of assuring reasonable prices for transmission service. 693 F.2d at 213. Even if this is so, "unbundling" does not inherently require the removal of all price regulation. Assuming arguendo that "unbundling" is a congressionally authorized policy, the most that such a policy could support would be a preemptive order that all CPE rates set by the states be determined on an unbundled basis.[6] This much, but certainly no more, could

[6] In fact, many state commissions have already taken steps to unbundle CPE rates from other charges. *See, e.g., Re New England Telephone and Telegraph Co.*, 42 P.U.R. 4th 182, 237 (Me. P.U.C. 1981), wherein the Maine PUC authorized disaggregation of extension service rates into separate prices for the basic telephone (CPE), and the extension line (wiring).

arguably be viewed as essential, in order for federal and state regulations to "be enforced without impairing the federal superintendence of the field." *Florida Lime*, 373 U.S. at 142.

To extend the preemption beyond unbundling to the abrogation of all state ratemaking authority over CPE, however, is to conclude that the FCC's "ancillary" jurisdiction includes the very power that lies at the heart of the *Shreveport* doctrine: the power to enter an order directly affecting intrastate rates.[7] The court of appeals itself acknowledges that "Congress may well have intended Section 2(b) of the Communications Act to prevent such a result in the communications area." 693 F.2d at 216 n.99. In the face of this recognized intention, however, the court of appeals has upheld a federal agency order that affects state rate orders in the most direct way possible — by denying them any effect whatsoever, regardless of the level of rates found reasonable by the state agency. In light of the congressional intention directly to the contrary of this result, it is obvious that the court of appeals has not applied the *Florida Lime* criterion in deciding the preemption question.

Unlike the D.C. Circuit Court of Appeals, the Court of Appeals for the Fourth Circuit has recognized that the FCC's regulatory flexibility and preemptive authority must stop short of interference in intrastate ratemaking determinations. In upholding the FCC's authority to preempt the states for the purpose of implementing a uniform policy for interconnection of CPE with the telephone network, the Fourth Circuit took pains to observe that the FCC's action in that instance "in no way purports to prescribe charges for local services; state commissions remain *unfettered in their discretion to set rates* for all local services and *facilities* provided by the telephone companies." *North Carolina Utilities Commission v. Federal Communications Commission*, 552 F.2d 1036, 1047 (4th Cir. 1977) (*"NCUC II"*) (emphasis added). In the predecessor of that deci-

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[7] The Shreveport doctrine was announced in *Houston, East and West Texas Railway v. United States*, 234 U.S. 342 (1914).

sion, the court also observed that "ratemaking typifies those activities of the telephone industry which lend themselves to practical separation...in such a way that local regulation of one does not interfere with national regulation of the other." *North Carolina Utilities Commission v. Federal Communications Commission*, 537 F.2d 787, 793 n.6 (4th Cir. 1976) (*"NCUC I"*).

Thus, the Fourth Circuit recognized the obvious congressional intent to preserve against preemption the ratemaking authority of state utility commissions, embodied in 47 U.S.C. §152(b). The D.C. Circuit, on the other hand, has brushed that reservation of authority aside, finding no distinction "between preemption principles applicable to state ratemaking authority and those applicable to other state powers." 693 F.2d at 216. The D.C. Circuit's finding that state ratemaking is not exempt from FCC preemption plainly conflicts with the conclusions of the Fourth Circuit. Even more importantly, the D.C. Circuit's reasoning is in conflict with the standards that this Court has established with respect to preemption.

CONCLUSION

Like the Federal Power Commission a decade ago, the FCC in its *Second Computer Inquiry* has attempted to respond to changing circumstances in the industry that it regulates by adopting radically different regulatory approaches without awaiting a redefinition of policy from Congress. Moreover, the FCC has purported to impose its newly created regulatory scheme upon the states, without any congressional mandate to do so. Despite the principles enunciated by this Court in the *Florida Lime* decision and in *FPC v. Texaco*, the court of appeals has affirmed the FCC's extraordinarily sweeping action. This Court should issue a writ of certiorari to determine whether state rate regulation of an essential utility industry can be abolished by federal agency action, in the face of an express reservation of ratemaking power to the states; and whether the Federal Communica-

tions Act, unlike the markedly similar Natural Gas Act, allows just and reasonable rates to be determined exclusively by mere reliance on market forces and abandonment of regulatory review. The Court in so doing can resolve issues of vital concern to the states and their regulatory bodies, due to the profound effect that the decision has on the states' ability to monitor the local, public impact of rapid technological and structural changes affecting an essential public service industry.

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Respectfully submitted,

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APPENDIX

COMPARISON OF NATURAL GAS ACT AND COMMUNICATIONS ACT

Communications Act	Natural Gas Act
"All charges, practices, classifications, and regulations...shall be just and reasonable..." 47 U.S.C. §201(b) (1962)	"All rates and charges...and all rules and regulations... shall be just and reasonable." 15 U.S.C. §717c (a) (1976)
"...any such charge, practice, classification or regulation that is unjust or unreasonble is declared to be unlawful." 47 U.S.C. §201(b)	"...any such rate or charge that is not just and reasonable is declared to be unlawful." 15 U.S.C. §717c (a)
"Every common carrier... shall...file with the Commission and print and keep open for public inspection schedules showing all charges..." 47 U.S.C. §203(a)	"...every natural-gas company shall file with the Commission...and keep open in convenient form and place for public inspection, schedules showing all rates and charges..." 15 U.S.C. §717c (c)
"No change shall be made in the charges... except after thirty days' notice to the Commission..." 47 U.S.C. §203(b)	"...no change shall be made...in any such rate...except after thirty days' notice to the Commission..." 15 U.S.C. §717c (d)
"...the Commission...may suspend the operation of such charge...but not for a longer period than three months..." 47 U.S.C. §204	"...the Commission...may suspend the operation of such schedule...but not for a longer period than five months..." 15 U.S.C. §717c (e)

"At any hearing involving a charge increased...the burden of proof to show that the increased charge...is just and reasonable shall be upon the carrier." 47 U.S.C. §204

"Whenever...the Commission shall be of the opinion that any charge...is or will be in violation of any of the provisions of this Chapter...the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge..." 47 U.S.C. §205

"At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company..." 15 U.S.C. §717c (e)

"Whenever the Commission ...shall find that any rate...is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate...and shall fix the same by order." 15 U.S.C. §717d (a)